No. 76-712

In the Supreme Court of the United States

OCTOBER TERM, 1976

PHYLLIS ANNE STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

MOTION TO DISMISS OR AFFIRM

DANIEL M. FRIEDMAN,
Acting Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

GEORGE R. HYDE,
MARYANN WALSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16(1)(a) and (c) of the Rules of this Court, the appellees move that this appeal be dismissed for lack of jurisdiction on the ground that the district court's dismissal of appellant's suit for lack of a substantial constitutional question is appealable only to the court of appeals; or, in the alternative, that the orders of the district court be affirmed because the grounds for appeal are so unsubstantial as not to need further argument.

STATEMENT

On October 29, 1974, appellant and other private property owners in Idaho filed suit in the United States District Court for the District of Idaho challenging the constitutionality of the Act establishing the Sawtooth National Recreation Area in Idaho, 86 Stat. 612, 16 U.S.C. (Supp. V) 460aa *et seq.* (hereinafter, the Act).

Jurisdiction was based solely on 16 U.S.C. (Supp. V) 460aa-3(a), which gives the United States District Court for the District of Idaho jurisdiction:

> to review any regulations established pursuant to the first sentence of this subsection* * *.

The Secretary of Agriculture, pursuant to Section 460aa-3 (a), had promulgated regulations setting standards for the use and development of private land within the boundaries of the Sawtooth National Recreation Area, which became effective April 29, 1974, 39 Fed. Reg. 11544, 36 C.F.R. 292.14 *et seq.* The plaintiffs also sought to enjoin enforcement of the Act and its regulations, a declaratory judgment that private land was not subject to the Act, and the convening of a three-judge court.

A three-judge court was designated to hear the matter, pursuant to 28 U.S.C. 2282 and 2284.[1] An amended complaint was filed on October 7, 1975, alleging jurisdiction pursuant to 16 U.S.C. (Supp. V) 460aa-3(a) and "pursuant to the Court's pendent jurisdiction arising in connection therewith." After a hearing, the three-judge court on June 25, 1976, dismissed the complaint: (1) for lack of subject-matter jurisdiction because the complaint failed to allege the court's jurisdiction to consider the constitutionality of the Act; (2) on the ground that, even if the court had jurisdiction, "the statutory scheme is well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution"; and (3) because no substantial federal constitutional question was presented (J.S. App. 1b-2b).

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[1]Section 2282 has been repealed and Section 2284 has been amended so as to eliminate the three-judge court requirement except in circumstances not applicable here; the amendment does not apply to actions commenced prior to August 12, 1976, the date of its enactment. Pub. L. 94-381, 90 Stat. 1119.

Instead of appealing from that judgment, appellant moved on July 26, 1976, for leave to file a second amended complaint. On August 23, 1976, the three-judge court denied the motion as "merely repetitive of prior complaints found to raise no substantial constitutional issue" (J.S. App. 4b). Its order, which was entered by District Judge McNichols pursuant to the three-judge court's direction, also stated that the court's order of June 25, 1976, "is made final" (J.S. App. 4b). The dismissal was "without prejudice to this single plaintiff pursuing any cause of action she may have under 16 USC § 460aa-3" (*ibid.*). Appellant appeals to this Court from "that portion of the order [of August 23, 1976] which makes final the June 25, 1976, order * * * finding that the 'statute under attack was constitutional'" (J.S. App. 5b).[2]

ARGUMENT

1. Appellant invokes this Court's jurisdiction under 28 U.S.C. 1253 on the ground that the three-judge district court, in its June 25, 1976 order, stated that even if jurisdiction had been alleged the challenged statute was constitutional. This order was followed by the August 23, 1976 order, denying leave to file a second amended complaint.

Appellant took no appeal from the first order. In our view, the second order, which she does seek to appeal, is not directly reviewable in this Court. That order rests on the fact that appellant's amended complaint was the same as "prior complaints found to raise no substantial constitutional issue" (J.S. App. 4b). A determination of unsubstantiality is not a determination on the merits; it is a jurisdictional disposition that requires dissolution of the three-judge

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[2]On October 19, 1976, appellant also filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.

court. *California Water Service Co.* v. *Redding*, 304 U.S. 252, 254-256. Such a decision is reviewable only in the court of appeals because "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804; *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 100-101; *Schackman* v. *Arnebergh*, 387 U.S. 427; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. A decision of a three-judge court dissolving itself on jurisdictional grounds for want of a substantial constitutional question is, in effect, the same as a decision by a single district judge refusing to convene a three-judge court on the same ground, and is therefore not within this Court's jurisdiction under 28 U.S.C. 1253. *Gonzalez* v. *Employees Credit Union, supra*; *Wilson* v. *City of Port Lavaca*, 391 U.S. 352.

The only possible doubt stems from the facts that the court's August order said its June order "is made final" and that in the June order the court, assuming *arguendo* that jurisdiction had been alleged, stated that the Act was within Congress' constitutional authority. Appellant apparently views the August order as a reissuance of the June order in which, according to appellant, the court resolved the constitutional question on the merits. Although we agree that appellant's reading of the "made final" language is possible, we do not believe it is the correct interpretation. Rather, it appears to us that the court merely intended to emphasize that it would adhere to its previous ruling in June; and the court's August order interpreted its previous ruling as resting on the lack of a substantial constitutional question. The August order therefore is appealable only to the court of appeals (and appellant has filed a notice of appeal to that court).

Although the foregoing indicates that the appeal should be dismissed, because of the ambiguity of the court's August order we entertain sufficient doubt on that score that we think it appropriate to discuss the merits of appellant's constitutional claim. If the Court decides that the August order resolved the constitutional issue on the merits and is therefore directly appealable, we submit that the judgment below should be affirmed.

2. Congress has authority to regulate recreational areas on public lands (cf. *Kleppe* v. *New Mexico*, No. 74-1488, decided June 17, 1976, slip op. 11-16) and to encourage owners of private property within such areas to conform their uses to the natural, historic and recreational purposes for which such areas are created, so that the government will not have to acquire their property by eminent domain. To this end, the Act provides that the Secretary of Agriculture shall publish regulations "for the use, subdivision, and development of privately owned property within the boundaries of the recreation area" consistent with its purposes, subject to judicial review in the district court on suit by any affected landowner. 16 U.S.C. (Supp. V) 460aa-3(a).

No privately owned lands may be acquired by condemnation unless the Secretary determines that the lands are being, or are in imminent danger of being, used in a manner incompatible with the regulations, or are necessary for access or development. 16 U.S.C. (Supp. V) 460aa-3(b). Even if such a determination is made, lands or interests therein may not be subjected to condemnation proceedings without the consent of the owner, unless all reasonable efforts to acquire the land or interests by negotiation have failed. 16 U.S.C. (Supp. V) 460aa-2(c).

Thus the provisions in the Act for regulations controlling land use are designed to preserve private ownership within the recreational area to the maximum extent consistent with

its purposes, and to provide for the condemnation of land for those purposes only when necessary. Congress' authority to utilize the power of eminent domain in this manner is well established. *Berman* v. *Parker*, 348 U.S. 26, 33. The Act's provisions and regulations thereunder do not threaten or interfere with appellant's quiet enjoyment of her property. To the extent that her lands or lesser interests therein are taken, appellant is entitled to just compensation. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-136. The Act is thus constitutional under Congress' power to regulate the property of the United States (United States Constitution, Art. 4, Sec. 3, Cl. 2) and to acquire property for public use upon payment of just compensation under the Fifth Amendment. See *Berman* v. *Parker*, *supra*.

CONCLUSION

For the reasons stated, this appeal should be dismissed; in the alternative the order of the district court should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

GEORGE R. HYDE,
MARYANN WALSH,
Attorneys.

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